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HOW THE BUSH ADMINISTRATION SHOULD HANDLE CHINA AND SOUTH CHINA SEA MARITIME TERRITORIAL DISPUTES

DANA R. DILLON

In August 2001 the United States Navy held a two-carrier passing exercise in the South China Sea. Navy spokesmen denied that the exercise was intended to send a message to China, but it was in the right location to do just that. In fact, Washington needs to do a lot more of the same as a first step toward protecting American interests in the South China Sea.

The United States is the world's largest trading nation; 90 percent of the world's trade moves via ship, and 45 percent of all shipping moves through Asia's lawless waters. America's continued prosperity requires free access to the markets and producers of Asia, and the United States Navy is the only reliable guarantor of freedom of navigation in Asia's seas.

But China's sweeping territorial claims in the South China Sea and skewed interpretation of the law of the sea are an explicit threat to the freedom of navigation. Six countries claim maritime borders in the South China Sea, but Beijing claims virtually the entire waterway as Chinese territory and declares that foreign warships traversing its maritime territory must first gain China's permission. Beijing's penchant for unilateral military action against the territorial claims of other countries in the region, such as establishing a naval outpost on Mischief Reef less than 200 miles from the Philip-

pinas, further militarizes the dispute and forces the countries of Southeast Asia to choose between confronting or submitting to Beijing's threats.

Thus far, the U.S. response to the Chinese challenge has been to remain neutral on the competing maritime border claims and to avoid criticism of China. Other countries in the region have made attempts to defuse the problem, such as Indonesia's informal conferences in the 1990s, but Beijing has refused multilateral solutions that do not recognize Chinese sovereignty. If Washington continues to allow Beijing's willful misinterpretation of the United Nations Convention on the Law of the Sea (UNCLOS) to remain unchallenged, the South China Sea will become a de facto Chinese lake, the countries of Southeast Asia will be subject to Beijing's interpretations of international law and sovereignty, and the American Navy will have to

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ask permission from China to transit this vital international waterway.

To avoid this outcome, the Bush Administration must make it clear to China and other claimants that the United States opposes extreme claims that interfere with or threaten freedom of navigation. Washington also must unequivocally oppose the use of force to resolve territorial disputes in, and recommend a demilitarization of the islands and reefs in, the South China Sea. Finally, the Bush Administration should insist that the competing claimants formulate a process to resolve the dispute.

THE DISPUTE

The South China Sea issue appears complicated because of the competing claims of six different governments, the arcane nature of the various historical claims, and the impotence caused by voluntary enforcement of the United Nations Convention on the Law of the Sea. In reality, the dispute is relatively easy to understand. Starting a process to resolve or neutralize the problem, however, requires American leadership and resolve.

Six countries claim the islands of the South China Sea: the People's Republic of China, the Republic of China (Taiwan), Vietnam, Malaysia, the Philippines, and Brunei. China, Taiwan, and Vietnam claim all of the islands in the South China Sea based largely on historical documents. The Philippines, Malaysia, and Brunei claim all or parts of the Spratly Islands based largely on their respective Exclusive Economic Zones (EEZ) and continental shelf. According to UNCLOS, an EEZ extends 200 nautical miles from the low-water line on a country's coast.¹

All the claimant countries use legal arguments, often based on skewed definitions of UNCLOS articles, to justify their territorial claims. Only China, however, exhibits the combination of broad

territorial claims; economic, political, and military strength; an uncompromising diplomatic stance; and demonstrated aggressiveness in pursuing its objectives. This unique combination of traits makes Beijing at once the most important player in resolving the territorial disputes and the biggest obstacle to doing so.

CHINA'S CLAIM

Although Beijing persists in reminding all other claimant countries that the South China Sea is Chinese sovereign territory, China has been very careful about not officially demarcating its specific maritime claims. Thus, other countries can only infer China's specific claims from Beijing's statements and actions, and China retains the option to change or redefine its maritime border according to the situation. The following analysis, therefore, is drawn from the large body of information published about the dispute but should not be considered the final word on China's position.²

The impracticality of drawing coastal boundaries for countries with complex and deeply indented coastlines, like Norway, or for archipelagic states, such as the Philippines or Indonesia, was recognized in such UNCLOS provisions as Article 7, *Straight baselines*, and Article 47, *Archipelagic baselines*. These articles permit countries to draw straight boundary lines across complex or closely spaced coastal features and islands as long as they do not interfere with customary freedom of navigation. Beijing, however, uses exaggerated definitions of these articles and its claimed islands and coastal features to draw its territorial borders more than a thousand miles from the Chinese mainland.³

The Standing Committee of the National People's Congress adopted the Law on the Territorial Waters and Their Contiguous Areas (Territorial Sea Law) on February 25, 1992. This law does not

1. United Nations Convention on the Law of the Sea (UNCLOS), *Exclusive Economic Zone*, Part V, 1982, p. 228.
2. This paper owes an intellectual debt to Mark J. Valencia for his extensive academic research on this subject. His ADELPHI Paper 298, *China and the South China Sea Disputes* (Oxford University Press, October 1995) was particularly valuable, as were his many other books and articles on the subject.
3. Max Herriman, Lieutenant Commander, Australian Centre for Maritime Studies Incorporated, *China's Territorial Sea Law and International Law of the Sea*, *Maritime Studies* 15, 1997, p. 3. See also discussion of China's claim by Xavier Furtado in "International Law and the Dispute over the Spratly Islands: Whither UNCLOS?" *Contemporary Southeast Asia*, Vol. 21, Issue 3 (December 1, 1999).

specify China's exact territorial claim, but it does assert sovereignty over the Paracel and Spratly Islands. Moreover, China has published a map showing the entire South China Sea from Hainan Island up to Indonesia's Natuna Island in an enclosed loop as territorial waters. In 1993, China verbally reassured Indonesia's foreign minister that the heavily populated and economically important Natuna Island was not claimed by China, but Beijing has since failed to formally confirm that informal statement.

Additionally, although most countries involved in the dispute use the same fuzzy or exaggerated definitions of UNCLOS provisions to justify their maritime borders, Beijing does them one better by also proffering a new definition of "territorial" waters. For most countries, "territorial waters" extend 12 nautical miles from the low-water line along a country's coast. When Beijing signed UNCLOS, however, it included a declaration that postulated definitions of territorial waters and rights of coastal states different from those written in UNCLOS.⁴ Among other things, China declared that:

1. In accordance with the provisions of the United Nations Convention on the Law of the Sea, The People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.
2. The People's Republic of China will effect, through consultations, the delimitation of boundary of maritime jurisdiction with the states with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the equitable principle.
3. The People's Republic of China reaffirms the sovereignty over all its archipelagoes and islands as listed in Article 2 of the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone which was promulgated on 25 February 1992.

4. The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state.

By making this declaration, China is defining how it will interpret certain sections of UNCLOS and how they apply to China's existing territorial claims. China is saying that its sovereign maritime border is 200 nautical miles, not the traditional 12 miles. Beijing is also claiming that the islands and reefs of the South China Sea are Chinese territory and thus also have EEZs extending an additional 200 nautical miles from these points. Finally, it is redefining China's rights as a coastal state by insisting that warships making innocent passage must first obtain Chinese permission, again a violation of both UNCLOS and the traditional laws of the sea.

The position of the Chinese government has direct implications for the freedom of navigation of America's Navy and Air Force vessels. China's insistence that any warship traversing the South China Sea must first gain permission nullifies the rights of foreign warships to conduct innocent passage. Furthermore, warships that do traverse territorial waters have severe restrictions applied to their operations. The following are some examples as outlined in Article 19 of UNCLOS:

- a) Any threat or use of force.
- b) Any exercise or practice with weapons of any kind.
- c) Any act aimed at collecting information.
- d) Any act of propaganda.
- e) The launching, landing or taking on board of any aircraft.

4. UNCLOS, China's Declaration.

- f) The launching landing or taking on board any military device.
- g) The carrying out of research or survey activities.

These restrictions, if applied to the entire South China Sea, would severely restrict the operations of the United States Navy and hinder its ability to protect both American and international shipping. For example, under the territorial waters restrictions, American carriers would be prohibited from launching aircraft. In modern navies, aircraft operations are indispensable for air-sea reconnaissance, marine mine detection, and attacking hostile ships and aircraft. Therefore, if a hostile force were to assault American or allied shipping in the South China Sea, the U.S. Navy would be helpless to detect or prevent such an attack.

Furthermore, in light of China's stated position, the dispute between China and the United States over the activities of the EP-3 reconnaissance airplane near Hainan Island in April 2001 should not be seen as an isolated incident. Rather, China's skewed interpretation of territorial waters transformed an unfortunate but routine accident into an international standoff. China's position on its territorial waters ensures that the "spy-plane" incident could well be the first round in an escalating confrontation between China and the United States.

Militarizing the Dispute. In addition to being an explicit threat to freedom of navigation, China's penchant for unilateral use of force has unnecessarily militarized the dispute. Vietnam and China dispute ownership of the Paracel Islands. The last time there was a clash of arms between claimants was in 1988 when Chinese and Vietnamese navies fired on one another. China was successful and now occupies all of the Paracel Islands, and as far as Beijing is concerned, the Paracels are no longer an issue for discussion. After this success, China signed UNCLOS, which provides clear arbitration mechanisms.

Before 1995, China participated in five Indonesia hosted unofficial conferences on the South China Sea designed to explore territorial disputes.

China participated in each of these conferences and agreed to the unofficial statements, including the prohibition on the use of force. Then, in 1995, it was discovered that China had built a navy station on Mischief Reef, a reef that is completely under water even at low tide and well within the EEZ of the Philippines. Neither the reef's location nor its lack of dry surface prevented Chinese officials from declaring the reef "historical" Chinese territory.

In short, China attends international fora and signs pleasant-sounding statements but steadfastly refuses multilateral negotiations, insisting that each dispute must be resolved bilaterally, and acts unilaterally. By so doing, it nullifies the UNCLOS arbitration mechanisms and the unofficial conferences sponsored by the Association of South East Asian Nations (ASEAN). Meanwhile, China continues to build up its naval and air forces in the region.

Finally, the failure to resolve the dispute has turned the South China Sea into a zone of anarchy. The various claimants not only have failed to negotiate boundaries, but also have failed to regulate over-fishing and the exploitation of seabed resources, control maritime piracy, or prevent rampant environmental degradation. The South China Sea's rapid decline will progress unchallenged until countries in the region agree to resolve their dispute.⁵

HOW STRONG IS CHINA'S CLAIM?

As stated earlier, China's claims are based largely on Beijing's unique interpretations of various articles of UNCLOS. But even a cursory examination of the articles in question indicates that China's position is not sustainable. For example, China's entire 10,000-mile coastline is not severely indented, as is Norway's coast, and its claim to a handful of uninhabited islands and reefs does not make China an archipelago.

To demonstrate the drastic impact of China's inflated claims, one needs only to examine what America's territorial boundaries would be like if Washington used the same interpretations of UNCLOS that China uses. In that scenario, the

5. Barry Wain, "The Sea—Asia's Depreciating Asset," *Asian Wall Street Journal*, June 8, 2001.

United States could claim a maritime border from the coast of California west past the Hawaiian Islands all the way to Guam; from Alaska and the Aleutian islands in the north; south to Howland, Baker, and Jarvis islands on the equator. Virtually the entire northern Pacific would be American “internal waters.”⁶

How would China, or the rest of the world for that matter, react if Washington demanded that vessels traversing the Pacific Ocean first seek the permission of the United States? In fact, the UNCLOS definition of islands requires that they be inhabited and support an economy.⁷ Because the American islands mentioned are inhabited, in some cases with robust economies, the American claim would be far stronger than China’s claim to uninhabited islands and submerged reefs of the Spratly and Paracel archipelagos.

For its part, Beijing cannot demonstrate that Chinese ever inhabited the Spratly or Paracel Islands, because they are uninhabitable. There are no sources of fresh water, and these low and in some cases submerged features are seasonally exposed to the monsoons of the region. Today, the only permanent populations of these islands and reefs are military garrisons maintained at immense expense to their respective governments and at great personal risk to the members of the garrisons.

Beijing also cites various vague, questionable, and off-point historical writings supposedly dating back more than 2,000 years in its attempt to document its claimed sovereignty over the South China Sea.⁸ Without doubt, Chinese explorers and fisherman sailed the South China Sea for thousands of years and recorded their exploits, but it is equally clear that the Chinese traditionally have viewed Hainan Island as the southernmost outpost of their civilization, certainly until the end of the 19th century.⁹

Finally, ancient Chinese records do not nullify the rights of the indigenous Philippine, Malaysian, and Bruneian peoples. The ancestors of today’s Filipinos, Malaysians, and Bruneians arrived on those archipelagos long before written Chinese history. They did not walk to those islands, so they must have sailed or paddled through both the Spratly and Paracel Islands to arrive where they are living today. Although the Spratly and Paracel Islands were too small for habitation, these people settled close to these islands and reefs and must be assumed to have fished and economically exploited them at least as much as the Chinese did.

FECKLESS AMERICAN POLICY

In the beginning of this new century, China has only a limited capability of enforcing its territorial definitions on the other littoral states, but this fact has not stopped China from bullying its smaller neighbors. This harassment can and frequently does involve naked military force.

So far, Washington has steadfastly refused to take sides even when China occupied a reef within the EEZ of an American ally, the Philippines, and later constructed an ever bigger naval outpost at that location. The United States has maintained strict neutrality, refusing to condemn China’s actions and merely calling for all sides to refrain from the use of force. With the most powerful country on earth appearing afraid to antagonize Beijing, it is little wonder that the countries of ASEAN have been unwilling to take a unified stand: They fear being exposed, unprotected, to China’s anger. The result: Individual countries are forced into impotent diplomatic objections and seldom support each other, no matter how abusive China’s behavior becomes.

WHAT WASHINGTON CAN DO

Although it is outside Washington’s jurisdiction to resolve the maritime border dispute in the

6. UNCLOS, Article 50.

7. UNCLOS, Article 121.

8. Ministry of Foreign Affairs of the People’s Republic of China, *Jurisprudential Evidence to Support China’s Sovereignty over the Nansha Islands*, 2000.

9. See introduction to Edward H. Schafer, *Shore of Pearls* (Berkeley: University of California Press, 1970).

South China Sea, America cannot allow China's interpretation of international law to remain unchallenged and become dominant in the region. It is in America's national interest to uphold the principle of freedom of navigation, seek stability in a volatile region, and restore order to a commercially important waterway.

To accomplish these tasks, the United States should:

- **Insist on adjudication of the disputed territories in accordance with international law.** The United States should recognize that each of the claimants has reasons to assert its maritime borders in the South China Sea and, based on this recognition, should take no sides in this dispute. However, the current state of anarchy is unacceptable to American interests, and a clear mechanism for dispute resolution needs to be established. UNCLOS provides for an arbitration process, and Indonesia's former multilateral efforts supply a venue.
- **Oppose extreme claims that would interfere with the freedom of navigation in the South China Sea.** Beijing's transparent intent to use its unwarranted and inflexible claims to sovereignty over the South China Sea to restrict the freedom of navigation—in direct conflict with the UNCLOS—directly challenge America's interest in keeping these strategic sea lines of communications open and unobstructed. Washington must abandon its agnosticism in the South China Sea disputes and make it clear that it views the claims of the People's Republic of China, in particular, as wholly unreasonable. If China is unwilling to take a more reasonable stance, the U.S. should lend its support to the other claimants. As a further demonstration of the importance of unrestricted access to international waters, the U.S. should continue to conduct regular freedom of navigation exercises in every corner of the South China Sea.

- **Make it clear that the use of force to settle any territorial disputes in the South China Sea is unacceptable and demand that claimants both withdraw all military personnel currently stationed on the islands and dismantle their fortifications.** Garrisoning the islands and reefs has done nothing but militarize the dispute, making a peaceful resolution more difficult. The government of Taiwan has recently replaced its military forces with coast guard personnel; the U.S. should recognize this as an acceptable compromise.
- **Encourage the competing claimants to formulate a temporary set of regulations, or "rules of the road," as a provisional measure until formal treaties can be negotiated.** The current state of lawlessness has resulted in the spread of criminal activity and the lack of formal regulations to govern the use of resources, as well as environmental degradation in the South China Sea.

CONCLUSION

Heightened U.S. participation in resolving the maritime border dispute would encourage the smaller countries with maritime borders in the South China Sea and at the same time discourage China from further attempts to impose its will unilaterally. Substantive solutions to the border dispute, however, will require all claimant countries to negotiate in good faith and accept compromises in their most controversial claims.

To protect freedom of navigation, the Administration must convince the countries in the region that continued anarchy in the South China Sea is not in their interests either. All claimant countries must demonstrate their willingness to protect their own long-term interests by seeking peaceful solutions to the border dispute.

—Dana R. Dillon is Senior Policy Analyst for Southeast Asia in the Asian Studies Center at The Heritage Foundation.